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No. 82-1203

# In the Supreme Court of the United States

OCTOBER TERM, 1982

JUDY RENEE SCALES, AS NEXT FRIEND OF CHARLES LEWIS SCALES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, the infant son of a former servicewoman, contends that the court of appeals erred in ruling that *Feres* v. *United States*, 340 U.S. 135 (1950), bars his suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, for injuries he sustained as a result of the Air Force's allegedly negligent treatment of his mother while she was on active duty and before petitioner was born.

1. Petitioner alleges that while his mother was on active duty in the Air Force, military medical personnel: (1) negligently administered a rubella vaccination to her without attempting to determine whether she was pregnant; (2) negligently failed to ascertain that she was pregnant at the time she contracted rubella; and (3) negligently failed to counsel her about the effects of rubella on a first-trimester

fetus and about the possibility of having an abortion. Petitioner alleges that, as a result, he was born with cogenital rubella syndrome, a pattern of serious birth defects that results from the exposure of a pregnant woman to rubella. Pet. App. A2-A4, A9-A10.[1]

Prior to trial, the government moved for dismissal of the complaint on the ground that petitioner's claim was barred under *Feres* because it was based on injuries arising out of activities incident to the military service of his mother. The United States District Court for the Western District of Texas denied the motion, ruling that the action was not barred by *Feres* because petitioner "is not and never has been a member of the armed forces" (E.R. 59).[2] After a trial, the district court found in favor of petitioner on each of his claims and entered a judgment against the United States for $625,000 (Pet. App. A9-A17).

The court of appeals reversed, holding that *Feres* precludes petitioner's claim (Pet. App. A1-A8). The court of appeals noted that the principal basis of the *Feres* doctrine is the risk that military discipline will be undermined if servicemen are allowed to question their superiors' acts in court (*id.* at A5-A6). Accordingly, the court of appeals

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[1]Petitioner advances two theories of liability. First, he alleges that he suffered prenatal injuries because of the negligence of Air Force personnel in administering a rubella vaccination to his mother without determining whether she was pregnant. Second, he alleges that the negligent failure of Air Force medical personnel to determine whether his mother was pregnant when she was diagnosed as having "probable rubella" or to determine, when her pregnancy was later diagnosed, that she had contracted rubella in her first trimester, and to counsel her about the effects of rubella on a fetus, prevented her from seeking an abortion. See Pet. App. A4, A9-A11. This latter claim is generally referred to as a claim for "wrongful life." See, *e.g.*, *Robak* v. *United States*, 658 F.2d 471, 474 n.3 (7th Cir. 1981); *Phillips* v. *United States*, 508 F. Supp. 537, 538 n.1 (D.S.C. 1980).

[2]"E.R." refers to the Excerpts of Record filed in the court of appeals.

explained, "the fact that [petitioner] was not on active duty at the time of the injury does not foreclose application of the *Feres* doctrine, nor does it matter that [petitioner] has an independent cause of action under state tort law. * * * [O]ur inquiry [must be directed] to the manner in which the policies underlying *Feres* are affected—specifically the impact on military discipline—rather than to the status of the claimant." *Id.* at A6. Because the treatment accorded to petitioner "as a fetus in his mother's body" was "inherently inseparable from" the treatment of his mother while she was on active duty, petitioner's "allegations of negligence * * * focus[ed] entirely on the medical treatment that Air Force physicians gave his mother" while she was on active duty. *Id.* at A7-A8. Consequently, the court of appeals concluded, "[w]hether [that treatment] constitute[d] negligence with respect to [petitioner] cannot be determined without requiring the court to second-guess military judgment in a manner inconsistent with the concern for military discipline that underlies the *Feres* doctrine." *Id.* at A8.

2. The court of appeals was plainly correct in concluding that *Feres* bars petitioner's claim. As the court recognized, the principal basis of the *Feres* doctrine is " '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of [intra-military tort] suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for * * * negligent acts committed in the course of military duty * * *.' " *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-672 (1977), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954); see 431 U.S. at 676 (Marshall, J., dissenting); *United States* v. *Muniz*, 374 U.S. 150, 162 (1963); *Hunt* v. *United States*, 636 F.2d 580, 599 (D.C. Cir. 1980). If a claim requires an inquiry into decisions made or actions taken incident to the service of a soldier, "the effect of the action upon military discipline is identical whether the suit

is brought by the soldier directly or by a third party." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673.

The actions of which petitioner complains were all taken by Air Force personnel in connection with either an immunization program for basic recruits or the medical care of a servicewoman during military training. As petitioner concedes (Pet. 14), his mother would be barred from maintaining a suit based on those actions; allowing such a suit would open decisions about the training and care of military recruits to post hoc examination by the courts, with the risk of interfering with military order and discipline. But petitioner's suit would require precisely the same inquiry as a suit by petitioner's mother based on the same events. "The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would * * * require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673.

The other courts of appeals that have considered similar claims by the children of servicemen have reached the same result. In *Monaco* v. *United States,* 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982), for example, the plaintiff claimed that she was born with a birth defect because the government negligently exposed her father to radiation while he was on active duty; the court of appeals ruled that her claim was barred by *Feres* because it required a court to "examine the Government's activity in relation to military personnel on active duty." 661 F.2d at 134.[3]

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[3]Our memorandum in opposition in *Monaco* discusses the issue raised by petitioner's claim, and we have sent a copy of that memorandum to counsel for petitioner.

See *Lombard* v. *United States*, 690 F.2d 215, 223-226 (D.C. Cir. 1982), petition for cert. pending, No. 82-1443 (filed Feb. 25, 1983). See also *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22, 1983); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 781 (E.D.N.Y. 1980).

3. Petitioner attempts to distinguish his claim from others held barred under *Feres* by asserting that his "cause of action is *not* dependent on establishing either that his mother was injured or that the government was negligent in the medical care and treatment of his mother." Pet. 19 (emphasis in original). Instead, petitioner contends, his "injuries were in no way derivative of any injury to his mother, but rather were the direct result of the negligence of Air Force medical personnel toward him. In fact—the critical fact—the mother * * * was not injured." *Ibid.* But the applicability of *Feres* plainly cannot depend on whether an action that affects a fetus in a pregnant woman is characterized as an injury to the woman, an injury to the child, or an injury to the child derived from an injury to the woman; such characterizations are irrelevant to the impact of an action on military discipline.[4] Every action challenged by petitioner was taken by Air Force doctors dealing with a servicewoman on active duty; petitioner does not show how the threat to military discipline presented by his claim differs in any way from the threat that would be posed if petitioner's mother filed a suit for injury to herself based on

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[4]We note that, in fact, petitioner's mother might have an actionable claim under Texas law on the facts alleged in petitioner's complaint. See *Jacobs* v. *Theimer*, 519 S.W.2d 846, 849 (Tex. 1975) (parents of child born with congenital rubella syndrome after doctor failed to counsel mother on risks posed by exposure to rubella may recover medical expenses necessitated by his condition). Of course, as petitioner recognizes, this claim too would be barred by *Feres* if brought against the United States.

the same actions. Petitioner cites a number of cases in which servicemen's dependents were allowed to sue under the Federal Tort Claims Act, but as petitioner's own description of these cases shows, in each the challenged military decisions and actions related solely to the dependent, not to the serviceman. See Pet. 14-15 n.14.[5] By contrast, the lower courts have consistently held that *Feres* bars dependents' claims that are, like petitioner's, based solely on actions taken toward a serviceman incident to service. See, *e.g.*, *Johnson* v. *United States*, 631 F.2d 34, 36 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981) (wrongful death); *De Font* v. *United States*, 453 F.2d 1239, 1240 (1st Cir.), cert. denied, 407 U.S. 910 (1972) (loss of companionship and loss of income); *Harten* v. *Coons*, 502 F.2d 1363, 1364-1365 (10th Cir. 1974) (suit for cost of raising child after negligent vasectomy performed on serviceman); *Van Sickel* v. *United States*, 285 F.2d 87, 91 (9th Cir. 1960) (wrongful death); *Harrison* v. *United States*, 479 F. Supp. 529 (D. Conn. 1979), aff'd, 622 F.2d 573 (2d Cir.), cert. denied, 449 U.S. 828 (1980) (loss of consortium); *Wisniewski* v. *United States*, 416 F. Supp. 599 (E.D. Wis. 1976) (marital disharmony).

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[5]For example, in *Grigalauskas* v. *United States*, 103 F. Supp. 543 (D. Mass. 1951), aff'd, 195 F.2d 494 (1st Cir. 1952), the claims were based on alleged malpractice towards an infant born to the wife of a serviceman. Obviously, the medical treatment of the infant after birth did not involve any decision by the military toward the infant's father. See also *Costley* v. *United States*, 181 F.2d 723 (5th Cir. 1950) (improper administration of anesthetic to serviceman's wife); *Messer* v. *United States*, 95 F. Supp. 512 (N.D. Fla. 1951) (malpractice on serviceman's wife); *Herring* v. *United States*, 98 F. Supp. 69 (D. Colo. 1951) (malpractice on serviceman's wife); *Steele* v. *United States*, 463 F. Supp. 321 (D. Alaska 1978) (malpractice on serviceman's son); *Sigler* v. *LeVan*, 485 F. Supp. 185 (D. Md. 1980) (illegal search and seizure of home).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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